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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

BIG HORN COUNTY ELECTRIC COOPERATIVE, INC., **Plaintiff,** **v.** **ALDEN BIG MAN, UNKNOWN MEMBERS OF THE CROW TRIBAL HEALTH BOARD, HONORABLE CHIEF JUSTICE JOEY JAYNE, HONORABLE JUSTICE LEROY NOT AFRAID, and HONORABLE JUSTICE KARI COVERS UP, Justices of the Crow Court of Appeals,** **Defendants.**	**Case No. CV 17-00065-SPW-TJC** **TRIBAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF** **ORAL ARGUMENT REQUESTED**

Pursuant to L.R. 7.1(d)(1)(C), Defendants Unknown Members of Crow Tribal Health Board, the Honorable Chief Justice Joey Jayne, and the Honorable Justices Leroy Not Afraid and Kari Covers Up (collectively, "Tribal Defendants"), file this reply brief in support of their motion to dismiss.

BACKGROUND

In May 2017, Big Horn County Electric Cooperative ("BHCEC") filed this action against the Tribal Defendants, seeking declaratory and injunctive relief related to a pending civil case filed by Defendant Alden Big Man against BHCEC in Crow Tribal Court. ECF No. 1. Big Man and the Tribal Defendants filed motions to dismiss on September 12, 2017 (ECF Nos. 32 and 34), with the Tribal Defendants arguing that BHCEC has failed to: 1) exhaust tribal remedies; and, 2) state a claim upon which relief can be granted. Furthermore, because Crow Tribal Health Board Members are entitled to official immunity, the case against them must be dismissed for lack of jurisdiction. BHCEC responded to Defendants' motions to dismiss on October 30, 2017 (ECF No. 39),[1] to which the Tribal Defendants now reply.

[1] In arguing against dismissal, BHCEC does not take issue with the standards for dismissal set forth by the Tribal Defendants. *See generally* ECF No. 34 at 12-16.

ARGUMENT

I. THIS COURT SHOULD DISMISS BHCEC'S COMPLAINT FOR FAILURE TO FULLY EXHAUST TRIBAL REMEDIES

It is well-established that, unless excused, full exhaustion of tribal remedies on questions of tribal jurisdiction is required before federal court review of such questions can occur on the record developed in tribal court. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985) (tribal courts must be allowed to develop "a full record" of the "factual and legal bases" for tribal jurisdiction); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987), *citing Nat'l Farmers Union*, 471 U.S. at 857 ("proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors'"). In an effort to avoid full exhaustion, BHCEC makes two arguments: 1) that exhaustion has already occurred; and, 2) that exhaustion is excused. Neither argument holds water.

A. Full Exhaustion of Tribal Remedies Has Not Occurred

There has not been full exhaustion of tribal remedies with respect to establishment in the tribal court record of a key factor – and other potential factors – relative to a determination of tribal jurisdiction over BHCEC. BHCEC completely fails to address this Court's cases on this point including *Glendale Colony v. Connell*, 46 F. Supp. 2d 1061 (D. Mont. 1997), and *City of Wolf Point v. Mail*, No. CV-10-

72-GF-SEH, 2011 WL 2117270 (D. Mont. May 24, 2011).

The key factor missing from the tribal court record in this case is the status of the land on which Big Man's claims of jurisdiction arise. Exhaustion is required where "[o]wnership and control of the land on which the operative events occurred has not been established." *City of Wolf Point*, 2011 WL 2117270, at *2; s*ee also LDFS LLC v. IEC Group, Inc.*, No. CV-17-08046-PCT-JJT, 2017 WL 3215556, at *4 (D. Ariz. July 28, 2017) ("the [need to identify the] location of the conduct that serves as the basis for these claims" compels exhaustion), *citing*, *inter alia*, *Window Rock Unified Sch. Dist. v. Reeves*, No. CV-12-08059-PCT-PGR, 2013 WL 1149706 (D. Ariz. Mar. 19, 2013), *aff'd*, 861 F.3d 894 (9th Cir. 2017); *Coeur d'Alene Tribe v. Johnson*, Docket No. 44478, 2017 WL 5017083, at *6 (Idaho, Nov. 3, 2017) (citations omitted) ("the Ninth Circuit [has] held that [land] ownership [is] a dispositive factor" in determining tribal jurisdiction).

Other factors not in the tribal court record include the nature and scope of the relationship between BHCEC and the Tribe, and the effect of BHCEC's actions and conduct on the Tribe. *Glendale Colony*, 46 F. Supp. 2d at 1066 (holding such factors to be relevant for determining tribal jurisdiction over non-Indians on fee land under *Montana v. United States*, 450 U.S. 544 (1981)). Again, BHCEC does not even address this Court's holding in *Glendale Colony*. Moreover, BHCEC's attachment to its brief (Exhibits B and C) in this Court of purported evidence of such

relationships and effect -- which could have been but was not presented to the Tribal Court in the first instance -- not only demonstrates that further exhaustion is needed, and is improper and in error under *Water Wheel Camp Recreational Area, Inc. v. LaRance*. 642 F.3d 802, 817 n.9 (9th Cir. 2011).

In sum, a "dispositive factor", *see Water Wheel*, 642 F.3d at 814, needed to guide the proper analysis of tribal jurisdiction in this case, *see Window Rock*, 861 F.3d at 898 (discussing the Court of Appeals for the Ninth Circuit's "long recognized two distinct frameworks" for determining tribal jurisdiction over non-Indians, each of which is based on the status of the land on which the claims of jurisdiction arise), is absent from the tribal court record in this case. BHCEC argues that there is "nothing further … to be decided by the tribal court," ECF No. 39 at 16, but it cannot be disputed that the land status on which Big Man's claims of tribal jurisdiction arise has been neither established in the Crow Tribal Court, nor reviewed by the Crow Appellate Court. Thus, despite BHCEC's arguments to the contrary, there has not been full exhaustion of tribal remedies. Accordingly, this Court should refrain from reaching the tribal jurisdictional issue until such exhaustion has occurred with respect to the development of the needed record that must precede federal court review of the issue.

B. No Exceptions to the Exhaustion Requirement Apply

Exhaustion of tribal remedies is excused in only four circumstances. *Window*

Rock, 861 F.3d at 898. The four exceptions to exhaustion are summarized as: 1) bad faith; 2) patently violative of express jurisdictional prohibitions; 3) futility; and, 4) plainly lacking. *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 847 (9th Cir. 2009), *cert. denied*, 558 U.S. 1024 (2009) (citation omitted). The burden is on the party seeking an exception to exhaustion to prove that an exception applies and is warranted. *Norton v. Ute Indian Tribe*, 862 F.3d 1236, 1243 (10th Cir. 2017). While BHCEC contends that "most" of these exceptions apply in this case, ECF No. 39 at 7, it fails to meet its burden of proof with respect to any of the exceptions for which it argues.[2]

1. BHCEC offers no proof of dishonest conduct to show bad faith, and did not raise bad faith in the Tribal Court

"[N]o court has ever found that the bad faith exception applies." *Acres v. Blue Lake Rancheria*, Case No. 16-cv-05391-WHO, 2017 WL 733114, at *3 (N.D. Cal. Feb. 24, 2017) (citation omitted). Nevertheless, bad faith has been defined as dishonest conduct on the part of the tribal court in conducting judicial proceedings, *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1201 (9th Cir. 2013), on the part of the tribal legislative body in enacting legislation, or, on the part of a tribal agency in enforcing such legislation. *Rincon Mushroom Corp. v. Mazzetti*, CASE NO. 09cv2330-WQH-JLB, 2017 WL 3174509, at *8 (S.D. Cal. July

[2] BHCEC does not appear to rely on the futility exception.

26, 2017) (citations omitted). Actual proof of dishonest conduct is required; mere allegations are insufficient to show bad faith. *See Acres*, 2017 WL 733114, at *3 (court allowed limited discovery on the issue of bad faith).

BHCEC's bad faith argument is premised primarily on the membership agreement between it and Big Man. ECF No. 39 at 8-9. BHCEC argues that the membership agreement contains forum selection clauses that preclude tribal court jurisdiction over BHCEC. *Id*. BHCEC further argues that Big Man and the Tribal Defendants have disregarded the membership agreement clauses in arguing for or determining tribal jurisdiction in this case. *Id*. But in trying to cast such disregard as bad faith, BHCEC presumes the point at issue, which is whether the clauses are determinative in whole or in part of tribal jurisdiction. BHCEC may dispute Defendants' interpretation or import of the clauses, but such a dispute does not rise to the level of bad faith. "Moreover, the Ninth Circuit has held that assertions of bias or bad faith must first be asserted in the tribal venue itself, which [BHCEC has] not done in this case." *Russ v. Dry Creek Rancheria Band of Pomo Indians*, No. C 06-03714 CRB, 2006 WL 2619356, at *2 (N. D. Cal. Sept. 12, 2006) (citation omitted).

2. BHCEC offers nothing to prove that tribal jurisdiction here is patently violative of any express jurisdictional prohibitions

Proof of the "patently violative of express jurisdictional prohibitions exception" typically is based on the text of either an applicable federal statute, *Dish Network Corp. v. Tewa*, No. CV 12-8077-PCT-JAT, 2012 WL 5381437, at *3-4 (D. Ariz. Nov. 1, 2012); *Paddy v. Mulkey*, 656 F. Supp. 2d 1241, 1246 (D. Nev. 2009)**,** or a tribal statute, *United States v. Ray*, CASE NO. C11-5056 BHS, 2011 WL 13118229, at *1 (W.D. Wash. Aug. 22, 2011). In the absence of such a statute, a mere "debatable question as to the propriety" of tribal jurisdiction does not suffice to establish this exception to exhaustion. *Elliott*, 2006 WL 3533147, at *6.

BHCEC does not rely on any statutory text to support the patently violative exception. Rather, it again resorts to language in the membership agreement into which it entered with Big Man in 1999. ECF No. 39 at 9, 11-12. BHCEC argues that the membership agreement forum selection clause, which provides for jurisdiction exclusively in state court to determine the rights of the parties to the agreement, is an express prohibition on tribal court jurisdiction over Big Man's claims against BHCEC. *Id.* at 8-9. While, outside of this Circuit, there is some authority for the proposition that such forum selection clauses excuse exhaustion, *e.g.*, *Enerplus Res. (USA) Corp. v. Wilkinson*, 865 F.3d 1094, (8th Cir. 2017), there is also authority for the proposition that such clauses require exhaustion, *e.g.*,

Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21 (1st Cir. 2000). The position of the First Circuit is consonant with Supreme Court jurisprudence, while the position of the Eighth Circuit is not. In *Williams v. Lee*, 358 U.S. 217 (1959), the Supreme Court denied state court jurisdiction over a suit arising on the Navajo Reservation and brought against an Indian, on the grounds that such a suit interfered with tribal self-government – the right of the Tribe to make its own laws and be ruled by them. That is a tribal, not an individual right, and an individual cannot waive it. *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (parents could not deprive tribe of jurisdiction over adoption of their child). The same rule applies in the federal context. *Pollara v. Radiant Logistics Inc.*, No. CV 12-03FF GAF (SPX), 2012 WL 112887093, at *2 (C.D. Cal. Feb. 17, 2012) ("forum selection clause does not deprive a federal court of subject matter jurisdiction") (emphasis in original and citations omitted).

3. Tribal jurisdiction is not plainly lacking such that further exhaustion would serve no purpose other than delay

It is well-established in this Circuit that the plainly lacking exception does not apply when there is a colorable or plausible claim of tribal jurisdiction. *E.g.*, *Window Rock*, 861 F.3d at 898; *Elliott*, 566 F.3d at 848; *accord St. Isidore Farm LLC v. Coeur D'Alene Tribe*, No. 2:13-CV-00274-EJL, 2013 WL 4782140, at *3 (D. Idaho Sept. 5, 2013) (to determine whether tribal jurisdiction is plainly lacking, a court determines whether jurisdiction is colorable or plausible, and if colorability or

plausibility is found, the plainly lacking exception does not apply and exhaustion is required). As the Tribal Defendants established in their opening brief, jurisdiction here is colorable or plausible, and thus cannot be characterized as "plainly lacking". ECF. 34 at 21-25.

As discussed above, factors dispositive to a determination of tribal jurisdiction such as the status of the land which give rise to Big Man's claim of tribal jurisdiction have not been established in the Crow Tribal Court or reviewed by the Crow Appellate Court. BHCEC fails to address, let alone counter, the leading case of this Court, *City of Wolf Point*, 2011 WL 211720, at *1, holding that the lack of establishment of land status at the tribal court level in and of itself defeats a plainly-lacking argument against exhaustion.

II. CLAIMS AGAINST THE TRIBAL HEALTH BOARD MEMBERS MUST BE DISMISSED FOR FAILING TO MEET THE STANDARDS IN RULES 12(b)(6) AND 8(a)(2)

BHCEC argues, in its Response, that it need only plead that a tribal ordinance exceeds the jurisdictional reach of the Tribe, and that no specific act or threatened act by Tribal Health Board Defendants need be asserted. ECF No. 39 at 5-7. However, nothing in the Complaint alleges actual or threatened conduct by the tribal officials; therefore the requirements for particularity and detail under Federal Rule of Civil Procedure 8(a)(2) have not been met and the case against the Tribal Health Board Defendants must be dismissed.

Rules 12(b)(6) and 8(a)(2) are interrelated, and, read together, establish the requirements to avoid dismissal at the pleading stage. *See, e.g., Bell Atlantic v. Twombly*, 550 U.S. 544, 557 (2007); *Cafasso ex rel. U.S. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). A complaint fails to state a claim upon which relief may be granted if a plaintiff fails to allege sufficient grounds for an asserted entitlement to relief. *Signal Peak Energy, LLC v. E. Mont. Minerals, Inc.* 922 F. Supp. 1142, 1148 (D. Mont. 2013). "A district court should grant a motion to dismiss if plaintiffs have not pled "enough facts to state a claim to relief that is plausible on its face." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (2008) *quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

Rule 8(a)(2) establishes the specific requirements for pleading to avoid dismissal. "In reviewing the dismissal of a complaint, we inquire whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Cafasso*, 637 F.3d at 1055 , *citing Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (citations omitted), *quoting Twombly*, 555 U.S. at 556-57. "Factual allegations must be enough to raise a right to relief

above the speculative level." *Twombly* at 1965. "[Rule] 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give a defendant a fair notice of what the [] claim is and the grounds upon which it rests.'" *Id*. at 1959 (citations omitted). BHCEC's Complaint is devoid of any specific allegations or relief sought as to Tribal Health Board Defendants, and its claims against them should be dismissed.

III. THIS COURT MUST DISMISS THE TRIBAL HEALTH BOARD DEFENDANTS PURSUANT TO RULE 12(b)(1) BECAUSE THEY ARE PROTECTED FROM SUIT BY THE TRIBE'S IMMUNITY

Indian tribes, as well as tribal officials acting within the scope of their authority, are immune from suit absent explicit congressional abrogation or a clear tribal waiver. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *United States v. Yakima Tribal Ct.*, 806 F.2d 853, 861 (9th Cir.1986). Tribal Health Board Members are officials of the Tribe, and have such immunity from suit.

A. Plaintiff Does Not Even Allege a Waiver

BHCEC has not alleged that sovereign immunity has been waived here. Waivers of sovereign immunity cannot be implied, *Miller v. Wright*, 705 F.3d. 919, 926 (9th Cir. 2013), and the burden to establish a waiver is on the plaintiff. *Unkeowannulack v. Table Mountain Casino*, No. CV F 07-1343 AWI DLB, 2007 WL 4210775, at *7 (E.D. Cal. Nov. 28, 2009) (citations omitted).

B. No Exception to Tribal Official Immunity Applies Here

BHCEC asserts that its claims against Tribal Health Board Defendants fall within exceptions to tribal sovereign immunity recognized by *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), applying the principles of *Ex Parte Young*, 209 U.S. 123 (1908), to prospective suits against tribal officials.

BHCEC's reliance on *Santa Clara Pueblo* is misplaced. While *Santa Clara Pueblo* recognized that tribal officers may be subject to suit under the *Ex Parte Young* doctrine, the conditions necessary for an *Ex Parte Young* exception do not exist here.

In *Ex Parte Young* the Supreme Court recognized a limited exception to the Eleventh Amendment immunity of state officials, in that it did not bar suits for prospective or injunctive relief against state officers in their official capacities, to enjoin ongoing violations of federal law. 209 U.S. at 155-56. The doctrine has been extended to suits "for prospective relief against tribal officers allegedly acting in violation of federal law." *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991). In order to determine whether *Ex Parte Young* exception applies, a court looks at "whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

The Complaint here merely states that "[t]he actions of Defendants imposing or seeking to impose tribal regulation or power over Big Horn, its agreements and relations with its members, violates federal law…" ECF No. 1 at 12. It is unclear what federal law BHCEC asserts has been violated, as the bulk of its Complaint focuses on the Tribal Court, and is devoid of any statement concerning actions Tribal Health Board Defendants are alleged to have taken or threatened to take which violate any specific provision of federal law. *Id.*; *accord* ECF No. 34 at 16, 30-35. BHCEC's Complaint fails to satisfy the requirements for application of the *Ex Parte Young* exception. Furthermore, although BHCEC's Complaint seeks prospective relief, the relief sought does not include any specific prospective relief against the Tribal Health Board Members. ECF No. 1 at 14-15.

BHCEC's reliance on *Baker* is also misplaced, as that case and others like it involved very different and more extensive regulatory efforts by the Tribe in that case; and, in any event, *Baker* did not foreclose jurisdiction, but rather remanded to the lower court to conduct a more appropriate inquiry. *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1478 (8th Cir. 1994). *Baker* is also not consistent with current Ninth Circuit caselaw analyzing the extent of tribal jurisdiction over non-members. *See, e.g.*, *Window Rock*, 861 F.3d 894*; Grand Canyon Skywalk*, 715 F.3d 1196*; Water Wheel*, 642 F.3d 802 .

CONCLUSION

For the reasons set forth in this reply brief, Tribal Defendants' motion to dismiss under Rule 12(b) and memorandum in support thereof, the Tribal Defendants request that their motion be granted.

Tribal Defendants request that oral argument on its motion be scheduled.

Respectfully submitted this 1st day of December, 2017.

/s/ Heather Whiteman Runs Him

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(B), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced except for footnotes and for quoted and indented material, and furthermore I certify that the word count calculated by Microsoft Word for Windows is 3,231 words, excluding the caption, and certificates of service and compliance, which is less than the permitted 3,250 words.

/s/ Heather Whiteman Runs Him

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 2017, a true and correct copy of the foregoing TRIBAL DEFENDANTS' REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF was filed with the Clerk of the Court via the CM/ECF system which will cause notice to be served upon the following:

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